

July 17, 2008

UNITED STATES COURT OF APPEALS

Elisabeth A. Shumaker
Clerk of Court

FOR THE TENTH CIRCUIT

In re:

RANDALL ZUNIE,

Movant.

No. 08-2133

(D.C. Nos. 1:07-CV-00671-WJ-CG &

1:03-CR-01453-WJ-1)

(D.N.M.)

ORDER

Before **LUCERO, McCONNELL**, and **HOLMES**, Circuit Judges.

The district court transferred to this court, as a second or successive motion, Randall Zunie's motion for reconsideration of the denial of his motion under 28 U.S.C. § 2255. Mr. Zunie has filed a motion to remand, or, in the alternative, a motion to consolidate this proceeding with his appeal of the denial of his § 2255 motion (appeal No. 08-2125). Because the district court did not err in construing the motion for reconsideration as a second or successive § 2255 motion, we deny the motion to remand and deny the motion to consolidate.

Background

After the district court denied his § 2255 motion, Mr. Zunie filed a motion for reconsideration. The motion focused particularly on one of the grounds for relief he raised in his § 2255 motion, arguing that his guidelines sentence was erroneously and illegally calculated because of the sentencing court's

preponderance-of-the-evidence findings. The district court construed the motion as a motion under Federal Rule of Civil Procedure 60(b) and held that, because the motion sought “to revisit the underlying conviction,” it actually was a second or successive § 2255 motion. *United States v. Zunie*, Nos. CV 07-0671 WJ/CEG, CR 03-1453 WJ, slip op. at 1 (D. N.M. June 6, 2008) (unpublished order).

Accordingly, the district court transferred the motion to this court. *See In re Cline*, __ F.3d __, 2008 WL 2673263, at *3 (10th Cir. July 9, 2008) (recognizing district court’s discretion to transfer unauthorized second or successive motions).

Analysis

Mr. Zunie first objects to the district court’s characterizing his motion as a Rule 60(b) motion. The district court did not err. “Depending on when the motion is filed, we construe a ‘motion for reconsideration’ as either a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e) or a motion for relief from the judgment under Fed. R. Civ. P. 60(b).” *Manco v. Werholtz*, 528 F.3d 760, 761 (10th Cir. 2008). Mr. Zunie’s motion was filed more than ten days after the judgment, and thus it was construed as a Rule 60(b) motion. *See id.* In any event, the characterization was not material to the district court’s task. Whatever the title of the motion, the district court ultimately still had to decide whether the motion was in substance a second or successive § 2255 motion. *See United States v. Nelson*, 465 F.3d 1145, 1149 (10th Cir. 2006) (“It is the relief sought, not [the] pleading’s title, that determines whether the pleading is a § 2255 motion.”).

Mr. Zunie also objects to the district court's characterization of the motion as a second or successive § 2255 motion and its decision to transfer the motion to this court. Again, the district court did not err. "[W]hether a postjudgment pleading should be construed as a successive application depends on whether the pleading (1) seeks relief from the conviction or sentence or (2) seeks to correct an error in the previously conducted habeas proceeding itself." *Nelson*, 465 F.3d at 1147 (discussing *Gonzalez v. Crosby*, 545 U.S. 524 (2005)). If the pleading seeks relief from the conviction or sentence, it should be treated as a successive filing. *Id.*; see also *Spitznas v. Boone*, 464 F.3d 1213, 1216 (10th Cir. 2006) ("Some examples of Rule 60(b) motions that should be treated as second or successive habeas petitions because they assert or reassert a federal basis for relief from the underlying conviction include . . . a motion seeking vindication of a habeas claim by challenging the habeas court's previous ruling on the merits of that claim.") (quotation and alteration omitted). Mr. Zunie's motion for reconsideration sought relief from his sentence by rearguing the merits of the sentencing guidelines claim that he raised in his § 2255 motion. Accordingly, the district court appropriately construed the motion for reconsideration as a second or successive § 2255 motion.

The motion for remand is DENIED. The motion to consolidate this proceeding and appeal No. 08-2125 is DENIED as moot. This proceeding is terminated.

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", followed by a long horizontal flourish.

ELISABETH A. SHUMAKER, Clerk